I can think of no better description of the defendants' behaviour than that contained in *Mayne and McGregor* on Damages to which I have referred above of acts "in contumelious disregard of the plaintiff's rights". It seems to me that there has been a wanton intentional interference by the defendants, and that accordingly the plaintiff is entitled to exemplary damages.

There will be judgment for the plaintiff for $3,500 and costs.

Judgment for the plaintiff.

Solicitors: *Jag-Jit Singh; Pillai, Lim, Lee & Hwang.*

SEMENANJONG TRADING CO. v. TEOH CHENG HOCK

[O.C.J. (Hepworth J.) January 11, 1963]

[Penang — Summons-in-Chambers No. 259 of 1962 in Civil Suit No. 300 of 1962]

Practice and Procedure — Statement of claim — Application by summons-in-chambers to strike out — Matter adjourned into open court for argument — Whether application properly brought under R.S.C., O.25 r.4.

Carriage of Goods by Sea — Cargo jettisoned during voyage — Agent of owner and consignee delivering other cargo to consigners without exercising lien of general average contribution — Damage suffered by owner of jettisoned goods.

The plaintiffs were the owners and the consignees of 105 bags of native tea dust which were shipped at Sumatra in motor vessel "Tiong An" of which the defendants were the agents under bills of lading dated November 22, 1960 for Penang. During this voyage from Sumatra to Penang the master of the vessel for purposes of saving the vessel and the rest of the cargo jettisoned the whole of the plaintiff's cargo and cargo belonging to two other consignees. There was incurred by the master of the ship general average sacrifices and expenditures as contained in the general average statement. On arrival of the motor vessel at Penang the defendant as such agent delivered the cargo remaining to the other consignees without obtaining from the said consignees the general average contribution due from them or any adequate security thereof and as a result the defendant had failed to exercise his lawful lien over the cargoes in respect of the contribution due to the plaintiffs and the plaintiffs had suffered damage thereby. The defendant made an application by summons-in-chambers under O.25 r.4 for an order that this statement of claim be struck out as disclosing no cause of action as it did not disclose whether the plaintiffs' claim was founded on contract or tort and even if it was based on contract how he could be liable even if the shipowner himself was.

Held: this application was properly made under O.25 r.4. The statement of claim could be amended so as to make it clear to the defendant what the case is that he has to answer and what the issue is that has to be tried.

Cases referred to:—

(1) *Scaife* v. *Tobin* (1832) 3 B. & Ad. 523.

(2) *Kemsley* v. *Foot* [1951] 2 K.B. 34.

(3) *Republic of Peru* v. *Peruvian Guana Co.* 36 Ch. D. 496.

SUMMONS-IN-CHAMBERS ADJOURNED INTO OPEN COURT.

A. P. Godwin (*Chang Min Tat* with him) for the plaintiff-respondent.

J. E. Lloyd (*Eugene Khoo* with him) for the defendant-applicant.

Hepworth J.: This is an application by the defendant by summons-in-chambers under Order 25 rule 4 for an order that the statement of claim be struck out as disclosing no cause of action. This summons has been adjourned into open court for argument.

When considering whether a statement of claim discloses a cause of action the statement of claim alone should be considered and all the allegations in it should be assumed to be true. It is assumed that the plaintiff can prove everything alleged in the statement of claim but that even then there is no case to answer.

The statement of claim discloses that the plaintiff was the owner and the consignee of a parcel of 105 bags of native tea dust which was shipped at Kuala Langsa, Sumatra, in motor vessel "Tiong An" of which the defendant was the agent under bills of lading dated the 22nd November, 1960, for Penang. During the voyage from Kuala Langsa to Penang the master of the said ship made and incurred general average sacrifices and expenditures, particulars whereof were contained in a general average statement. This general average statement showed that the plaintiff was entitled to general average contribution in respect of his goods amounting to $11,021.18.

In addition to the plaintiff's cargo other cargo was also consigned for four other consignees. By reason of running into a strong gale the master of the said motor vessel for the purpose of saving the said motor vessel and the rest of the cargo jettisoned the whole of the plaintiff's cargo and a portion of the cargo belonging to two of the other consignees.

On the arrival of the said motor vessel at Penang the defendant as such agent delivered the cargo remaining unjettisoned to the other four consignees. The defendant did so without obtaining from the said consignees the general average contributions due from them or any or any adequate security therefor.

The plaintiff contended that the defendant had in making this delivery failed to exercise his lawful lien over the said cargoes in respect of the contribution due, *inter alia*, to the plaintiff. The plaintiff contended that the defendant was thereby in breach of his duty to the plaintiff by failing to claim the said contribution from the other consignees as aforesaid and that as a result the defendant had deprived the plaintiff of his general average contribution.

In the alternative the plaintiff contended that by not obtaining as in duty bound from

the said consignees the general average contributions due from them or any or any adequate security therefor the defendant had wrongfully caused the plaintiff to suffer damage.

It is the defendant's complaint that from the statement of claim it is not clear, firstly, whether the plaintiff's claim is founded in contract or tort and secondly, even assuming that there was a contractual relationship between the plaintiff and the shipowner, how the defendant could be liable even if the shipowner himself was. The defendant's arguments are based on the premise that the right of action in general average is a right in contract and not in tort and that the plaintiff's claim against the defendant is for loss of general average contribution and ancillary relief.

During the performance of a contract of carriage by sea there are, speaking generally, three separate interests which are exposed to the risks incidental to a maritime adventure, namely, the interest in the ship, the interest in the freight, and the interest in the cargo. In the ordinary course, any loss which may be sustained by any of these interests falls upon the particular interest affected, in which case the loss, if not total, is called a particular average loss. Where, however, the loss arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the several interests involved, it no longer falls upon the particular interest exclusively, but must be borne in due proportion by all. The loss is then called a general average loss; the sacrifices or expenses which give rise to it are known as general average sacrifices and general average expenses, whilst the amount to be contributed towards the loss by the respective interests is called a general average contribution. (*Halsbury's Laws of England*, 3rd edition, Volume 35, page 502, paragraph 721). It is not contested in this case that there have been general average sacrifices and general average expenses.

All persons whose interest in the adventure is benefited by a general average sacrifice or by a general average expenditure are liable to make a general average contribution. These persons are: (1) the shipowner who is liable in respect of the ship, and also in respect of the freight; (2) the charterer, if any, who is liable in respect of his interest in the bill of lading freight; in such a case the shipowner's liability as regards the freight is restricted to the chartered freight; if the charter-party is by way of demise, the charterer is also liable in respect of the ship; (3) the owner of the cargo, who is liable in respect of the cargo; and (4) any other person who may be liable under some express term in the contract of carriage. Thus the bill of lading may preserve the shipowner's liability, or it may provide for payment of general average contribution by the consignee. The liability of any particular interest to make contribution is usually enforced by the shipowner on behalf of all interests concerned. He is entitled, as regards the cargo, to exercise a lien over it, and to withhold delivery until any general average contributions due either to himself or to any other persons have been paid. Unless the contract otherwise provides, it is his duty to exercise his lien on behalf of such other persons; and if he fails to do so, he is himself liable to them. In practice, delivery of the cargo is usually made upon the cargo owner giving security to pay the amount which will be found due upon adjustment. (*Halsbury's Laws of England*, 3rd edition, Volume 35, page 511, paragraphs 729 and 730).

The defendant argues that as he does not come within any of the categories of persons liable to make a general average contribution his liability must arise either under some express term in the contract of carriage (which is not pleaded) or as agent of the shipowner.

Halsbury goes on to say that a consignee is not, as such, liable even though he has taken delivery of the cargo; he may, however, make himself liable as under a new contract, by taking delivery with notice that the cargo is held by the shipowner subject to his lien for general average contribution. This statement of the law, the authority for which is given as the case of *Scaife* v. *Tobin*, [1] is not altogether clear as it stands and it is necessary to look at the judgment in that case. That was a case in which there was no express contract and the only question was whether one was to be implied from the facts of the case. In his judgment in that case Parke J. said:—

> "It is said there will be no hardship in holding the defendant liable, because he had notice of the loss which gave rise to the general average, before he received the goods. That may be true, but it is not a sufficient ground for implying a contract to pay it. Neither is it a sufficient ground that general convenience may require that a mere consignee should be liable. The shipowner is not without his remedy in such a case; for to prevent the inconvenience of resorting to the consignor, he may insert in the bill of lading an express clause that the goods shall be delivered to the consignee, he paying general average; or he may insist on his right of lien, and refuse to deliver unless the consignee pays or agrees to pay it. Then on what ground is a contract to be implied? The shipowner's parting with his lien on the goods may be a good consideration for an express promise by the consignee to pay general average, but does not raise any implied contract to pay it, even though the consignee has notice that a general average has been incurred."

It will be seen therefore that mere notice that a general average has been incurred does not raise any implied contract to pay it. The shipowner's parting with his lien on the goods may, however. be a good consideration for an express promise by the consignee to pay general average.

A consignee. who is the absolute owner of the goods, is liable to pay general average because the law throws upon him that liability. There is no other person to pay it. It is not alleged in the statement of claim that the consignees referred to were the absolute owners of the goods. As has already been said a mere consignee. who is not the owner, is not liable unless before he receives the goods he is informed by the shipowner or the master that if he takes them he must pay general average.

The defendant argues that as in the present case there was no express contract between the shipowner and the consignees to pay general average, and as in the particular circumstances of the case there was no implied contract to pay, the shipowner, of whom the defendant is the agent, could not in any event recover general average from the consignees. The plaintiff cannot therefore be heard to complain that the defendant has failed to do something which he has no power to do.

The defendant further argues that even if the shipowner was contractually liable to the plaintiff for general average he could not recover from the defendant, as agent of the shipowner, because the defendant had not made any contract with the plaintiff on behalf of the shipowner. An agent can only be liable if he made a contract on behalf of the principal. (*Halsbury's Laws of England*, 3rd edition, Volume I, page 230, paragraph 518).

The plaintiff states firstly, that this is a substantial point of law and where in the preliminary stages of an action a substantial point of law arises requiring to be argued objection should be taken on the pleadings and the point set down for argument in accordance with Order 25 rule 2. Applications under Order 25 rule 4 and Order 19 rule 27 for the striking out of any matter in a pleading on the grounds specified in the Rules should be confined to plain and obvious cases. (*Kemsley* v. *Foot* [2]).

To dispose of this point at once there is no doubt that if there is a point of law which requires serious discussion an objection should be taken on the pleadings and the point set down for argument under rule 2. If there is an issue to be tried it can only be tried by the action pursuing its normal course and being heard in open Court. (*Mallal's Supreme Court Practice*, Volume I, page 318). However, I do not think that we have yet reached this point. Shorn of all its trimmings what the defendant's argument is is initially that he does not know whether the plaintiff's claim is founded in contract or tort, that he is entitled to know this and on the face of the statement of claim as it stands it is not possible to say with any certainty what the plaintiff's claim is. The defendant then further says that as the plaintiff is claiming general average contribution and the right of action in general average is a right in contract the plaintiff's claim must be founded in contract and such claim is not maintainable in any event against the defendant for the reasons set out above. In my view this application is properly made under Order 25 rule 4.

The plaintiff's second point is that a pleading will not be struck out under this rule "unless it is not only demurrable but something worse than demurrable", that is such that no legitimate amendment can save it from being demurrable. (Chitty J. in *Republic of Peru* v. *Peruvian Guana Co.* [3]).

The plaintiff states that this is not an action for general average contribution. It is an action against the agent of the shipowner for damages for failing to do what was his duty. He alleges that it was the duty of the defendant to exercise the shipowner's lien on behalf of persons entitled to general average contribution and on his failure to do so he is himself liable to them. (See paragraph 730 of *Halsbury* referred to above).

The plaintiff alleges that the defendant the agent of the shipowner, allowed the cargo to be delivered in circumstances in which it should not have been delivered. The agent had a duty to the plaintiff and by failing to act in accordance therewith has made himself personally liable to damage flowing from the breach. (*Bowstead on Agency*, 12th edition, page 290, Article 132).

The plaintiff alleges that owing to the negligence of the defendant as the agent of the shipowner he has suffered damage. He is in effect alleging that the defendant should have refused to deliver the cargoes to the consignees unless they paid or agreed to pay general average and in failing to do so has been guilty of negligence.

The plaintiff concedes, however, that negligence has not been clearly pleaded in the statement of claim, but submits that this can be cured by amendment and counsel for the plaintiff stated that he would be prepared to undertake to apply for leave to amend the statement of claim within a specified time.

The defendant says in reply that the claim is for general average contribution, that it is framed in contract (see Form 71 in Volume 5 of *Atkin's Encyclopaedia of Court Forms and Precedents*), and that the plaintiff has no claim in tort.

I do not think that at this stage I am concerned with whether or not the plaintiff has a good claim in tort, any more than I would be concerned at this stage with the fact that a case is weak and unlikely to succeed or that a claim appears to be barred by some statutory defence as, for example, limitations. (See *Mallal's Supreme Court Practice*, Volume I, page 319). In my view the statement of claim can be amended so as to make it clear to the defendant what the case is that he has to answer and what the issue is that has to be tried.

Subject to the plaintiff applying for leave to amend the statement of claim within 21 days from today there will be no order on the summons, except that the costs of and incidental to this application shall be taxed and paid by the plaintiff to the defendant.

No order on the summons. Costs, etc. of the application to be paid by the plaintiff.

Solicitors: *Chang Min Tat; Eugene Khoo.*